MISCELLANY.

Mechanics' Liens—When Notice Must Be Given to Render Owner Personally Liable to Sub-Contractor—Va. Code, 1904, Sec. 2479.—In the case of Brumbaugh *v.* The Jefferson Hotel Company, et al, United States Circuit Court for the Eastern District of Virginia, Special Master Jackson Guy in his report dated January 1, 1906, discusses the question as to when notice must be given the owner to make him personally liable. He says that "the indefiniteness of the statute, quoad time, admits of four possible constructions, viz: that the notice may be given (1) before performance, (2) before and during performance, (3) during but not before or after performance, (4) before, during, and after performance, and proceeds to discuss these four possible constructions as follows:

First: I think the first of these is excluded; for, if the legislature had intended to limit the giving of notice to the period before performance, it would have followed the unmistakable language, to that effect, found in the Code of 1887.

Second: The second construction strikes me as the right one; i. e., that the notice may be given before and during performance. I say this because there is nothing in the language of the act forbidding notice before performance and nothing forbidding notice during performance.

Third: The third construction is rejected because it demands that the act forbid notice before performance, which, as just seen, it does not do.

Fourth: The fourth construction is rejected because it includes the giving of notice after performance, which I do not think was contemplated. If the work is done and the materials furnished, the sub-contractor has done his job and the amount due to him therefor could not properly be described as a probable amount; it might of course be an approximate amount: at any rate I think the use of the word "probable," connected with the giving of the notice in the first part of the statute, followed just afterwards by "and ..... after the work done or materials furnished ..... shall serve the sworn account," denotes a sequence of time in the order of the two events.

To these conclusions counsel took no exceptions and the special master's report was confirmed.

But in this connection it would be well to remember that the statute formerly read (Code 1873, Ch. 115, Sec. 5) "probable" value of labor "to be" performed, etc. The words in quotation were struck out by Acts 1874-5, p. 437. In the present statute the word "probable" is restored, but not the words "to be." The use of the word "probable" does not necessarily indicate that notice must be given before

the completion of the work but only that it may be given at that time. Under the statute as it appeared in Acts 1874-5 the word "probable" was not used and it was doubtful whether notice could be given until after the work was performed. It was important that the sub-contractors should have the privilege of giving notice to owners before the work was completed in order to increase the chances of notice catching funds due the general contractor in the hands of the owner. If the sub-contractor had to wait until the work was completed, as it might seem he would have to do—until the word "probable" was re-inserted—he would have lost his remedy by reason of the fact that the owner might have settled with the general contractor before receiving notice. Mr. Manson, in his ariticle in 2 Va. Law Reg. 504, in commenting on the statute in its present state, says that "it is by no means certain that a notice that found the owner with funds in his hands due the general contractor would be held bad, because it came after the completion of the work or the furnishing of material." There can certainly be no good reason for allowing the sub-contractor, who can only state the "probable" amount of his claim, to look to the owner, while that privilege is denied the sub-contractor whose work is actually done and whose claim is no longer "probable" but certain, and whose notice catches funds in the hands of the owner belonging to the general contractor.